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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT CARLO YANDOLINO,

Defendant and Appellant.

C084772

(Super. Ct. No. 62137894)

A jury found defendant Robert Carlo Yandolino guilty of first degree murder (Pen. Code, § 187)¹ with lying-in-wait and financial gain special circumstances (§ 190.2, subd. (a)(1), (15)), attempted murder (§ 664/187), corporal injury to a cohabitant (§ 273.5, subd. (a)), two counts of assault with a firearm (§ 245, subd. (a)(2)), and dissuading a witness (§ 136.1, subd. (b)(2)), and sustained enhancements for personally discharging a

¹ Undesignated statutory references are to the Penal Code.

firearm causing great bodily injury and discharging a firearm (§ 12022.53, subds. (c), (d)). The trial court sentenced defendant to serve life without the possibility of parole plus 25 years to life plus 34 years in prison.

On appeal, defendant contends (1) the trial court abused its discretion in denying his motion to sever the corporal injury and assault with a firearm counts, (2) there was insufficient evidence to support the lying-in-wait and financial gain special circumstances, and (3) the lying-in-wait special circumstance violates due process because it is unconstitutionally vague. In a supplemental brief, he contends (4) the matter should be remanded for the trial court to determine whether to exercise its discretion to strike the firearm enhancements.

We conclude there was no abuse of discretion in denying the motion to sever, substantial evidence supports both special circumstances, and defendant's constitutional claim is precluded by California Supreme Court precedent. Since a change in the law giving courts discretion to strike firearm enhancements applies retroactively to defendant's case, we shall remand for the trial court to determine whether to strike the firearm enhancements. In all other respects, the judgment is affirmed.

BACKGROUND

The Murder and Attempted Murder

Defendant's father, Carlo Yandolino, owned and ran the Monte Vista Ranch Olive Oil company in Newcastle with his wife Rebecca McGuire. They also owned an 18.9 acre horse ranch off Fruitvale Road in Placer County and lived on an Oakhurst Way property containing hundreds of old growth olive trees. The properties were very valuable; Yandolino and McGuire also had \$4,500,000 to \$5,000,000 in liquid assets. In the event of their death, Yandolino's half of the estate would go to his two sons, while McGuire, who had no children, would give her half to charity. Defendant and

his brother Brian were beneficiaries of the family trust. Defendant knew he was a beneficiary.

Defendant had a strained relationship with his father. He would ask Yandolino and McGuire for money to buy a car, rent an apartment, for living expenses, to start a computer consulting company, and, in 2014, to start a marijuana farm on the ranch property. They did not give defendant the money he sought, as Yandolino believed people should work for what they get rather than having it handed to them. Defendant would complain to McGuire about Yandolino not giving him money, asking at one point, “Why can’t I be a trust fund baby?” He was also upset that Oscar Diaz, an employee and friend of Yandolino’s, was allowed to live in the house, while Yandolino and McGuire offered only to let defendant stay in a trailer on the property.

Defendant complained to his girlfriend, Tyler A., that Yandolino would not support him financially. They started living together in March 2015; defendant did not work then and looked like he needed help. Defendant was behind on payments for his Lexus. He told Tyler he was not close to his father, who had all of this money and would not help him. When his car was repossessed, defendant told Tyler that if his father was dead he would at least get something from him.

Around 8:30 a.m. on May 14, 2015, Yandolino and Diaz went to the Oakhurst Way property; Yandolino drove his car while Diaz followed in a tractor. Upon arriving, Diaz saw defendant standing next to his car. Defendant walked up to Yandolino’s car and stood next to the driver’s side window while Yandolino remained in the vehicle. Diaz looked away as he moved the tractor around defendant’s car. After hearing a gunshot, Diaz looked to Yandolino’s car, where he saw blood on the passenger side window. Defendant was by the driver’s side window.

Diaz jumped from the tractor and ran across the street towards the irrigation canal. He heard two more gunshots and saw one shot hit the ground near him. Diaz jumped into the canal. As Diaz was trying to get out of the canal, defendant aimed a gun at Diaz, but it did not fire, so defendant threw the firearm in the canal. Defendant next threw a rock at Diaz and said, "Fuck you." The rock hit Diaz in the head; he fell and feigned unconsciousness. His wound required seven or eight stitches.

Diaz went to Yandolino's car, where he saw Yandolino slumped over and bleeding heavily. He ran to the house and yelled for McGuire to call 911. McGuire, who was in the house, had heard two gunshots, one right after the other. She picked up the phone but put it down and went outside after hearing yelling. Diaz, who was wet and bleeding, said, "Robert shot Carlo." McGuire called 911, kenneled the dogs, and went down the driveway. She did not see defendant, but saw his silver Lexus 300 driving away.

Yandolino died as a result of a penetrating contact gunshot wound to the head. Two nine-millimeter shell casings were found at the scene, one in Yandolino's car, and the other near the rear passenger tire. A Kahr Arms nine-millimeter handgun and magazine were found in the canal. The magazine contained ammunition, including a loose bullet towards the top that was partially seated in the magazine and could have caused the gun to malfunction. The gun's serial number matched that of a handgun sold to Tyler at a Sacramento gun store on April 21, 2015. Defendant paid for the weapon and bought ammunition for it. A search of Tyler's apartment found brochures for the Kahr Arms pistol and handwritten notes stating Tyler gave defendant permission to leave the apartment with the firearm.

Calls sent to and from defendant's cell phone placed it in the vicinity of Yandolino's home shortly before and after the incident.

Crimes Against Tyler

In April 2015, defendant was angry with Tyler because she was making blankets for newborn babies in ICU without getting paid. He told Tyler, “why don’t you ever do anything to make money,” and put a gun to her head. Defendant said he could “do it and get away with it,” but would not because of Tyler’s son. Tyler bought a gun, the only one she ever owned, a month before Mother’s Day. Defendant went with her and paid cash for it and for hollow point ammunition, but the gun was registered in Tyler’s name.

On the day before Mother’s Day 2015, defendant hit Tyler in the eye, giving her a cut and a black eye. On the morning of Yandolino’s murder, defendant got angry and stormed off. Defendant pointed Tyler’s gun at her head and then drove off in the Lexus. Tyler used her car to take her son to a doctor’s appointment in Roseville, about 35 minutes away.

According to Tyler, defendant and Tyler left their apartment at the same time that morning. Defendant was at the apartment when Tyler returned at around 10:30 a.m. He had changed his clothes and asked Tyler to immediately wash some of them in hot water. Defendant told Tyler his father was dead. He then said, “No, I’m just joking. Oscar did it. My dad’s dead.” When Tyler expressed her disbelief, defendant told her to watch the news, but then told her not to. An anxious defendant told Tyler that if anyone asked, he was with her all day.

The Defense

A defense expert testified that the prosecution’s cell phone tower evidence was flawed as it did not account for the tower antennas, the antennas’ angle, their elevation, or the topography of the surrounding terrain.

Defendant testified he did not shoot his father. He never spoke to him about the trust. On the day his father was shot, defendant left Tyler's apartment at 7:30 a.m. to get coffee and go to the body shop to repair his car. He returned to the apartment at 8:30 a.m. Defendant did not tell Tyler his father was dead or tell her to wash his clothes. He bought the gun for Tyler, but it was stolen and told her to report the theft. He never assaulted Tyler.

Rebuttal

On the day of the murder, defendant told Tyler to report the gun as stolen and not ask questions why. He walked away and then came back, telling her not to report the gun stolen as it would "look weird."

DISCUSSION

I

Motion to Sever

Defendant was charged with two counts of assault with a firearm against Tyler (counts 4 and 5) and a count of domestic violence against Tyler (count 3). Defendant moved to sever these counts from the remaining counts, which the trial court denied.

Defendant contends this was an abuse of discretion. We disagree.

Section 954 provides in relevant part: "An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts, . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may, in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately."

“ ‘The law prefers consolidation of charges.’ [Citation.]” (*People v. Manriquez* (2005) 37 Cal.4th 547, 574.) “The benefits to the state of joinder [are] significant. Foremost among these benefits is the conservation of judicial resources and public funds. A unitary trial requires a single courtroom, judge, and court attaches. Only one group of jurors need serve, and the expenditure of time for jury voir dire is greatly reduced over that required were the cases separately tried. In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process.” (*People v. Bean* (1988) 46 Cal.3d 919, 939-940.) Due to the legislative preference for joinder, “[t]he burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried. [Citations.]” (*Id.* at p. 938.)

“We review the trial court’s denial of a severance motion for abuse of discretion. [Citation.]” (*People v. Smith* (2007) 40 Cal.4th 483, 510.) “The pertinent factors are these: (1) would the evidence of the crimes be cross-admissible in separate trials; (2) are some of the charges unusually likely to inflame the jury against the defendant; (3) has a weak case been joined with a strong case or another weak case so that the total evidence on the joined charges may alter the outcome of some or all of the charged offenses; and (4) is any one of the charges a death penalty offense, or does joinder of the charges convert the matter into a capital case. [Citation.]” (*People v. Marshall* (1997) 15 Cal.4th 1, 27-28.)

Defendant concedes the charges met the technical requirements for joinder. He argues good cause for severance existed because the evidence of the gun assaults and domestic violence against Tyler would not be admissible in a trial on the remaining charges. Contending this evidence was “inherently prejudicial,” defendant concludes its admission was reversible error.

Whether evidence of the joined charges is admissible against the other charges is not dispositive. Without engaging in a detailed analysis of the admissibility under Evidence Code section 1101 of all of the evidence of defendant's attacks on Tyler, we nonetheless note the motive for the first attack, defendant's anger at Tyler for engaging in a volunteer activity rather than earning money, is evidence of a need for money, and therefore relevant to a motive for murdering his father and the financial gain special circumstance. However, even if defendant was correct that the relevant evidence of his behavior towards Tyler could be separated from his violent acts against her, severance was not required. Defendant's acts of violence against his girlfriend are not inflammatory when viewed in the context of the accused crimes, the murder of his father and an attempt to kill the only eyewitness. The evidence regarding both sets of charges was strong; there was physical and eyewitness evidence of the murder and attempted murder. Tyler provided coherent, uncontradicted testimony of defendant's crimes against her. And joinder did not transform this case into a capital case. We conclude it was not an abuse of discretion to deny the motion to sever.

II

Sufficiency of the Evidence

Defendant asserts there is insufficient evidence to support the lying-in-wait and financial gain special circumstances. We conclude substantial evidence supports both special circumstances.

“In reviewing a criminal conviction challenged as lacking evidentiary support, ‘ “the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. ’ ” ’ [Citation.] The same standard of

review applies to special circumstance allegations. [Citation.]” (*People v. Hinton* (2006) 37 Cal.4th 839, 884.)

A.

Lying in Wait

The lying-in-wait special circumstance requires “ ‘an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage” [Citations.]’ ” (*People v. Moon* (2005) 37 Cal.4th 1, 22.)

The Supreme Court has “ ‘explained the elements of the lying-in-wait special circumstance as follows. “ ‘ ‘The element of concealment is satisfied by a showing “ ‘that a defendant’s true intent and purpose were concealed by his [or her] actions or conduct. It is not required that he [or she] be literally concealed from view before he [or she] attacks the victim.’ ” ’ ” [Citation.]” ’ [Citation.] As for the watching and waiting element, the purpose of this requirement ‘is to distinguish those cases in which a defendant acts insidiously from those in which he [or she] acts out of rash impulse. [Citation.] This period need not continue for any particular length “ ‘of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.’ ” [Citation.]’ [Citation.] ‘The factors of concealing murderous intent, and striking from a position of advantage and surprise, “are the hallmark of a murder by lying-in-wait.” [Citation.]’ [Citation.]” (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1073, fn. omitted.)

Defendant claims there was insufficient evidence of a substantial period of watchful waiting to support the special circumstance. He notes that the only witness,

Diaz, arrived at the residence with Yandolino, and, immediately upon seeing Yandolino, defendant went up to his car and shot him. From this, he concludes there was no evidence defendant was at the residence a substantial time before Diaz and Yandolino arrived.

There is no fixed minimum time for the waiting requirement. (*People v. Mendoza, supra*, 52 Cal.4th at p. 1073.) “ ‘The precise period of time is . . . not critical,’ ” so long as the period of watchful waiting is “ ‘substantial.’ ” (*People v. Moon, supra*, 37 Cal.4th at p. 23.) Thus, “a few minutes can suffice. [Citations]” (*Ibid.*)

In order for defendant to lie in wait for his victims, he had to be parked at the residence before Yandolino and Diaz arrived. While Diaz could not know when defendant arrived, there is no evidence he saw him or his car before arriving at the residence in the rural location. In addition, defendant had to get to the location sufficiently before Diaz and Yandolino so he could be out of his car and waiting for them.

The waiting element establishes a state of mind equal to premeditation and deliberation. Defendant got to the area where he knew Yandolino and Diaz would be before they arrived. He came armed with the pistol he used to murder his father and attempt to kill Diaz. From this, the jury could find defendant spent sufficient time waiting for his victims to show a state of mind like premeditation and deliberation. Nothing more is required.

B.

Financial Gain

To prove the financial gain special circumstance, the prosecution must show that “ ‘the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain.’ ” [Citation.]” (*People v. Carasi* (2008) 44 Cal.4th 1263,

1309.) “However, such gain need not be the sole or main motive for the murder. [Citation.]” (*Id.* at p. 1308.) The special circumstance “ ‘is not a technical one’ ” and is intended “ ‘to cover a broad range of situations.’ [Citation.]” (*People v. Noguera* (1992) 4 Cal.4th 599, 636-637.) Financial gain may include the proceeds of a life insurance policy, assets of an estate, and avoidance of a debt. (*Id.* at pp. 634-635; *People v. Jackson* (1996) 13 Cal.4th 1164, 1190; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1025.)

Defendant argues the evidence is insufficient because he would benefit financially only if Yandolino and McGuire were dead. Asserting there was no evidence of a plan to kill McGuire, defendant concludes the evidence was insufficient to support the special circumstance.

The evidence shows defendant had financial trouble and resented his father for not supporting him financially. Tyler’s testimony that defendant said he would get at least something from his father if he was dead is evidence defendant thought he would inherit upon his father’s death without regard to whether McGuire was alive. While defendant would not get his inheritance until both Yandolino and McGuire were dead, there is no evidence he knew this fact. Substantial evidence supports the jury’s finding defendant murdered his father out of a desire to gain his inheritance.

III

Constitutionality of the Lying-in-wait Special Circumstance

Defendant contends the lying-in-wait special circumstance is unconstitutionally vague, a violation of his right to due process. The California Supreme Court has repeatedly rejected this contention. (*People v. Delgado* (2017) 2 Cal.5th 544, 576.) Defendant recognizes this, and raises the issue solely to preserve it for federal review.

We are bound by the Supreme Court’s holding. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Consequently, we reject this claim.

IV

Firearm Enhancements

In a supplemental brief, defendant contends the matter should be remanded to allow the trial court to determine whether to exercise its discretion to strike the section 12022.53 enhancements. The Attorney General’s brief, filed after defendant’s supplemental brief, does not address this point. We conclude remand is appropriate.

On October 11, 2017, the Governor signed Senate Bill 620 (2017-2018 Reg. Sess.). As relevant here, Senate Bill 620 provides that effective January 1, 2018, section 12022.53 is amended to permit the trial court to strike an enhancement for personally using (§ 12022.53, subd. (b)) or personally and intentionally discharging (*id.* subd. (c)) a firearm. The new provision states as follows: “[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (Stats. 2017, ch. 682, § 2.) Prior to this amendment, an enhancement under former section 12022.53 was mandatory and could not be stricken in the interests of justice. (See former § 12022.53, subd. (h) (Stats. 2010, ch. 711, § 5); *People v. Felix* (2003) 108 Cal.App.4th 994, 999.)

The amendment to section 12022.53 applies retroactively to cases not final on appeal. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) When a trial court is unaware of sentencing discretion, the appropriate remedy is to remand for the court to exercise its discretion. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) In the case of Senate Bill 620,

a remand is required unless the record shows the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 427-428.) Since the record does not support such a finding, we shall remand to allow the trial court to determine whether to strike either, both, or none of the firearm enhancements.

DISPOSITION

The conviction is affirmed and the matter is remanded to allow the trial court to determine whether to exercise its discretion to strike the Penal Code section 12022.53 firearm enhancements. In all other respects, the judgment is affirmed.

_____/s/
HOCH, J.

We concur:

_____/s/
HULL, Acting P. J.

_____/s/
RENNER, J.